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ALEXANDER L. STEVAS,
CLERK

No. 83-710

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARRY J. BERKEMER, SHERIFF
OF FRANKLIN COUNTY, OHIO,
Petitioner,

v.

RICHARD N. McCARTY,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Cassidy and Meeks
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Cassidy and Meeks

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Attorneys for Respondent

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

THE QUESTION PRESENTED FOR REVIEW

Respondent is not satisfied with Petitioner's question presented for review. The following question is more properly brought to this Court for review:

> Whether the principles announced in *Miranda v. Arizona, 384 U.S. 436* and *Argersinger v. Hamlin, 407 U.S. 25* require that law enforcement officers provide "Miranda warnings" prior to engaging in custodial interrogation of individuals arrested for traffic misdemeanors.

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OPINIONS BELOW

The opinion of the Franklin County Court of Appeals is set forth at page A-9 of the Appendix. The opinion of the United States District Court for the Southern District of Ohio, Eastern Division, is set forth at page A-17 of the Appendix. The opinion of the United States Court of Appeals for the Sixth Circuit is set forth at page A-21 of the Appendix.

JURISDICTION

Respondent accepts Petitioner's statement of jurisdiction, but urges that this Court in exercising its judicial discretion deny the writ.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part:

> "[no person]. . . shall be compelled in any criminal case to be a witness against himself,. . ."

The Sixth Amendment of the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

STATE STATUTES INVOLVED

Ohio Revised Code Section 4511.19, Driving While Intoxicated

"No person who is under the influence of alcohol or any drug of abuse, or the combined influence of alcohol and any drug of abuse shall operate any vehicle, streetcar, or trackless trolley within this State."

Ohio Revised Code Section 4511.99, Penalties

(A) "Whoever violates Section 4511.19 of the Revised Code is guilty of a misdemeanor of the first degree, in addition to the license suspension or revocation provided in Section 4507.16 of the Revised Code, at least three (3) days imprisonment is mandatory under this division."

Ohio Revised Code Section 2929.21, Penalties for Misdemeanor

(A) "Whoever is convicted of, or pleads guilty to a misdemeanor, other than a minor misdemeanor, shall be imprisoned for a definite term or fined, or both, which term of imprisonment and fine shall be fixed by the Court as provided in this section."

(B) "Terms for imprisonment for misdemeanors shall be imposed as follows:

(1) For a misdemeanor of the first degree, not more than six (6) months: . . ."

STATEMENT OF THE CASE

Respondent is satisfied with Petitioner's statement of the case.

ARGUMENT

Respondent asserts that the Petition for Writ of Certiorari should be denied. Petitioner contends that because of conflicting decisions on the issue of providing *Miranda* warnings for traffic misdemeanants that certiorari should be granted. A closer look at this contention and the judicial opinions in apparent conflict with the Sixth Circuit decision in *McCarty v. Berkemer*, render the inescapable conclusion that *Clay v. Riddle, 541 F. 2d 456 C.A. 4 (1976)* and *State v. Pyle, 19 Ohio St. 2d 64 (1969)* incorrectly applied the doctrine of *Miranda v. Arizona, 384 U.S. 436 (1966).*

The decisions in *Pyle* and *Riddle, supra*, focused on the type of offense involved - traffic misdemeanors. Both decisions suggested that *Miranda v. Arizona, supra*, was not intended to protect the Fifth Amendment rights of those arrested for misdemeanor offenses. In short, both *Pyle* and *Clay, supra*, reached their respective decisions by focusing on the type of offense that gave rise to police questioning, while ignoring the critical issue of nature of interrogation. Interestingly, in each case, dissenting justices accurately articulated the application of *Miranda's* principles by focusing on whether questioning was custodial or non-custodial and noting further that no language can be found in *Miranda* that excludes misdemeanants from its protection.

In *McCarty v. Berkemer*, the Sixth Circuit properly interpreted the holding of *Miranda v. Arizona, supra*, by concentrating on the type of interrogation conducted, rather than offense severity. The Sixth Circuit properly followed the mandate of this Court as set forth seventeen (17) years ago in *Miranda v. Arizona:*

> "Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is

this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from *custodial interrogation* of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (Miranda v. Arizona, at 444)* (emphasis added)

Additionally, the Sixth Circuit properly interpreted and applied this Court's decision in *Argersinger v. Hamlin, 407 U.S. 25 (1972)*, which pertained to the scope of a defendant's Sixth Amendment right to counsel. Indeed, the combined logic of *Miranda* and *Argersinger, supra*, lead inescapably to the conclusion that individuals arrested for traffic misdemeanors must be advised of "Miranda warnings" prior to custodial interrogation.

The Respondent asserts in conclusion that *State v. Pyle* and *Clay v. Riddle, supra*, were wrongly decided without proper regard to the controlling language of this Court in *Miranda v. Arizona, supra*. Therefore, the Petition for Writ of Certiorari should be denied.

CONCLUSION

The determination of whether or not to grant the Petition for Writ of Certiorari rests within the sound discretion of this Court. Although no one factor is controlling, Petitioners contend that a conflict of decisional case law exists on this issue.

Respondent submits that any existing conflict with the Sixth Circuit's decision in *McCarty v. Berkemer* is a product of erroneous interpretations of this Court's holding in *Miranda v. Arizona, supra.* This Court has unambiguously held that the nature of interrogation determines whether the privilege against self-incrimination applies and the Sixth Circuit has accurately followed that precedent.

Respondent asserts that this Court should not grant the Petition for Writ of Certiorari where wrongly decided cases create the appearance of case law inconsistency. Accordingly, this Court is urged to exercise its judicial discretion and deny the Petition for Writ of Certiorari.

R. William Meeks
Counsel of Record
503 South High Street
Columbus, Ohio 43215
Telephone (614) 228-3569
Attorney for Respondent

CERTIFICATE OF SERVICE

This is to certify that three copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari were mailed to Stephen Michael Miller, Prosecuting Attorney, Attorney for Petitioner, 369 South High Street, Columbus, Ohio 43215, by regular United States Mail, this 12th day of December, 1983.

R. WILLIAM MEEKS
Attorney for Respondent

APPENDIX A

IN THE FRANKLIN COUNTY MUNICIPAL COURT
COLUMBUS, OHIO

STATE OF OHIO,	:	
Plaintiff,	:	
vs.	:	Case No. 123915 (1980)
RICHARD N. McCARTY,	:	
Defendant.	:	

STIPULATION

The following stipulation is entered into by defense counsel, R. William Meeks, and Assistant City Prosecutor, James Sika. The purpose of this stipulation is to dispense with the necessity of an evidentiary hearing in open court, since there is agreement concerning the essential facts giving rise to this constitutional issue and the particular legal issues to be presented on appeal stemming from the Court's overruling of the Defendent's Motion to Suppress Custodial Statements.

Had there been an evidentiary hearing, the defense would have called as a witness Trooper C.J. Williams of the Ohio State Highway Patrol. His stipulated testimony is as follows: On March 31, 1980, Trooper Williams, while on his regularly assigned duty, observed the Defendant's vehicle traveling south on Interstate 270 at milepost 30. Trooper Williams observed the Defendant's vehicle weaving in and out of its expected lane of travel. Trooper Williams followed the Defendant's vehicle for approximately two miles, at which time it was stopped and the Defendant was asked to exit the car. Trooper Williams observed that the Defendant needed support to keep himself from falling as he got out of his vehicle.

At this time, Trooper Williams concluded that the Defendant would be charged with a traffic offense and, therefore, his freedom to leave the scene was terminated. The Defendant was then asked to perform the field sobriety test, designated as the "balance test," and according to Trooper Williams, he was "falling." While still at the scene of the arrest, Trooper Williams questioned the Defendant concerning his use of intoxicants and the Defendant replied that he had consumed two beers and had smoked several joints of marijuana a short time before. While questioning the Defendant, Trooper Williams noticed that the Defendant's speech was very slurred and mush-mouthed and it was very hard to understand him. The Defendant was then formally placed under arrest for operating a vehicle while under the influence of alcohol and taken to the Franklin County Jail for an intoxilyzer test to determine the percentage of alcohol present in the Defendant's system. The result of the test was .000.

While at the Franklin County Jail, Trooper Williams continued to question the Defendant in order to fill out the information sought by the State Highway Patrol Alcohol Influence Report. (A copy of the completed Alcohol Influence Report is admitted as a joint exhibit and is formally made a part of the stipulation herein.) While questioning the Defendant concerning information contemplated by the Alcohol Influence Report, Trooper Williams asked the Defendant if he had been drinking, to which the Defendant responded in the affirmative. Trooper Williams asked the Defendant if he were under the influence of alcohol, to which the Defendant repsonded, "I guess, barely." Trooper Williams asked the Defendant if the marijuana he admitted smoking had been treated with another chemical and requested the Defendant to write out his response. As indicated on the Alcohol Influence Report form under the section designated "Remarks,"

the Defendant responded in writing "no angle [sic] dust or PCP in the pot. Rick McCarty."

It is further stipulated between the parties that Trooper Williams did not advise the Defendant of his constitutionally protected rights, announced in *Miranda v. Arizona*, prior to questioning the Defendant either at the scene of the arrest or later in custody at the Franklin County Jail.

/s/Golden, Sep 16 1980
SIDNEY H. GOLDEN, JUDGE

Approved:

/s/R, William Meeks
R. WILLIAM MEEKS (MEE02)
Attorney for Defendant
24 North High Street
Columbus, Ohio 43215
614 228-3569

/s/W. James Sika
W. JAMES SIKA (SIK01)
Assistant City Prosecutor
375 South High Street
Columbus, Ohio 43215
614 222-8904

A-4

APPENDIX B

ALCOHOLIC INFLUENCE

REPORT

SAFETY

Richard N. McCarty — Address 629 Princeton Av, Cedar Rapids, Ia.

Age 27 — Sex M — Race Cauc — Address — Weight 165 — Height 5'6" — Operator Lic. No. N1265516 — State Iowa

OBSERVATIONS:

Appearance (Type & Color) — Dress — Hair — Face — Eyes — Condition — Odor of Alcoholic Beverage — Speech — Attitude — Unusual Actions

PERFORMANCE TESTS

(Note - See departmental instructions for conducting these tests)

	Check appropriate square below word describing condition observed					
BALANCE	Falling	Needed Support	Wobbling	Swaying	Unsure	Sure
WALKING	Falling	Staggering	Stumbling	Swaying	Unsure	Sure
TURNING	Falling	Staggering	Hesitant	Swaying	Unsure	Sure
FINGER-TO-NOSE	Right: Completely Missed		Hesitant	Sure		
	Left: Completely Missed		Hesitant	Sure		
COINS	Unable	Fumbling	Slow	Sure	(Other)	

(Balance during coin test)

Ability to understand instructions: Poor / Fair / Good — Tests performed: Date 2-3-62 Time 0:33

ARRESTING OFFICER STATEMENTS OF FACT:

VEHICLE (Give any defect that may have contributed to this violation)

Effects of alcohol: Excessive / Obvious / Slight / None — Ability to drive: Impaired / Not

Did you observe the defendant drive prior to the arrest? Yes / No — If not, identify person who did

Indicate unusual actions or statements when first observed and what led you to suspect alcoholic influences. This statement may be produced in court if you testify as a witness, as required by the Ohio Rules of Criminal Procedure:

I observed the vehicle operated by the defendant at approximately 0:33 A.M. on February 3, 1962. The vehicle was traveling at a speed of approximately 45 miles per hour in a 35 mile per hour zone. The vehicle was operated in a careless manner, crossing the center line of the highway and the right edge line of the highway. The defendant was stopped and I observed that his eyes were bloodshot and his speech was slurred. His breath had a strong odor of alcohol. He was unsteady on his feet and had to support himself against the car. He was arrested and taken to the police station where he was given a breathalyzer test which indicated a blood alcohol content of .15%. He was then released on bail.

CHEMICAL TEST DATA:

Specimen: ☐ Blood ☐ Breath ☐ Saliva ☐ Urine ☐ None
☐ Refused ☐ Unable

Analysis result: .0[illegible]
If Breath, what instrument? Intoxilyzer

If refused, why?

SUPPLEMENTAL TEST:

Advised of right to have additional test performed: (Yes) No Witness: U-

Was additional test performed? Yes No Unknown

INTERVIEW:

Were you operating a vehicle? Yes Where were you going? Home

What street or highway were you on? I-10 EBC Direction of travel? East

Where did you start from? SR 761 What time did you start? I Don't Know

What time is it now? 01:30a What city (county) are you in now? Pinal County

What is the date? Oct What day of the week is it? Sunday

INTERVIEWER TO FILL IN ACTUAL: Date Time Type Name Date Time Interviewer's Initials

When did you last eat? 8:00 Pm What did you eat? Food

What were you doing the last three hours? Visiting Friends

Were you drinking? Yes What? 2 Beers How much? 2-Beers

Where? Mobile Co Started? 8:30 Stopped? 8:30

Are you under the influence of an alcoholic beverage now? 2 beers Ago What is your occupation? Tree Trimmer

Have you ever been stopped for DUI/I before? Yes

Do you have any physical defects? No If so, what?

Are you ill? No If so, what's wrong?

Do you limp? Yes Have you been injured lately? Yes If so, what's wrong? Hurt my back

Did you get a bump on the head? Were you involved in an accident today?

Have you had any alcoholic beverage since the accident? No If so, what?

Where? How much? When?

Have you seen a doctor or dentist lately? No If so, what? When?

What for? Are you taking tranquilizers, pills or medicine of any kind? Asp.

If so, a list here? (Get sample) Last dose? am/pm Do you have epilepsy? No

Diabetes? Do you take insulin? If so, last dose? am/pm

Have you had any injections of any other drugs recently? No If so, what for?

What kind of drug? Last dose? am/pm When did you last sleep? 8:30 Pm

How much sleep did you have? None Are you wearing false teeth? No Do you have a glass eye? No

HANDWRITING SPECIMEN
Spontaneous writing by dictation

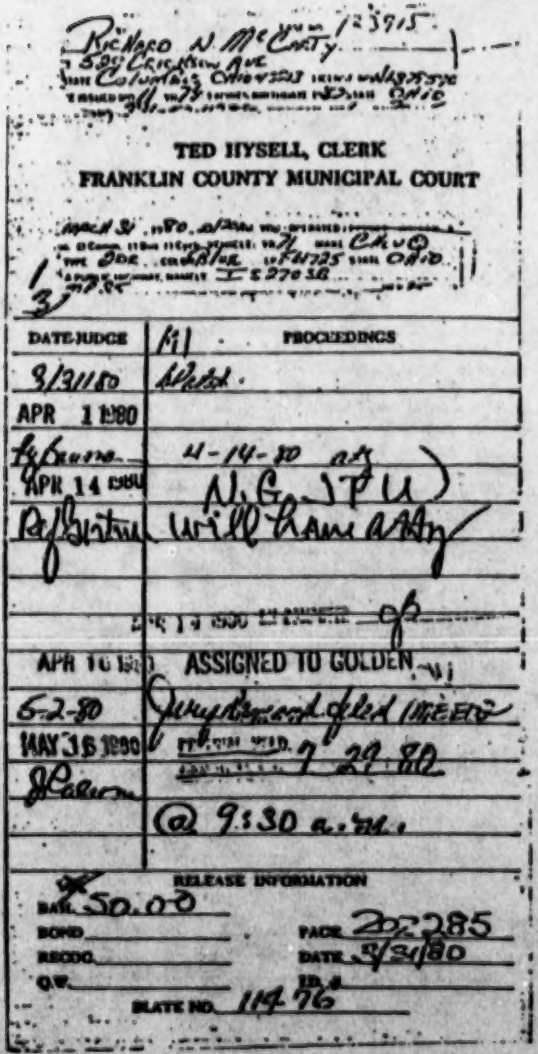
Richard McCall

SUPPLEMENTARY DATA: (Note - Get witnesses, including officers who observed, to prove driving)

WITNESS			HAS WITNESS SEEN DEFENDANT OPERATING	WHAT WAS HE DOING?	WHERE INVESTIGATED
Name	Address	Tel. No.			
Name	Address		Telephone		

REMARKS: Pt states I last ate at Home. Denies any Medical Problems or DCP in Effect at this time.
Ruth Richards

APPENDIX C



Richard N. McCarty 123915
529 Crichton Ave
Columbus, Ohio 43223

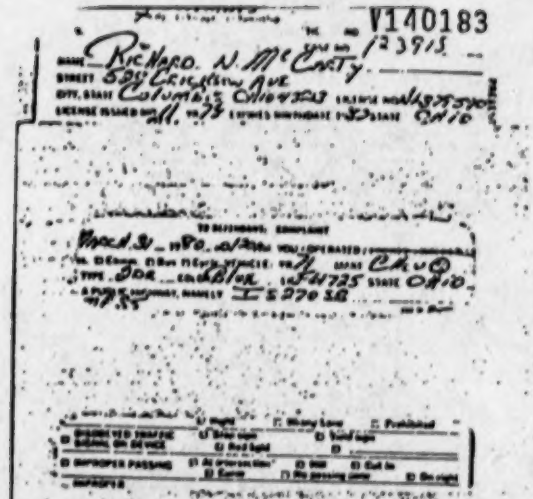
TED HYSELL, CLERK
FRANKLIN COUNTY MUNICIPAL COURT

CHVO
FH725 OHIO
I 5270 58

DATE-JUDGE	PROCEEDINGS
3/31/80	Filed.
APR 1 1980	
[illegible]	4-14-80 atty
APR 14 1980	N.G. JPU
[illegible]	Will [illegible] Atty
	APR 14 1980 ...
APR 16 1980	ASSIGNED TO GOLDEN
6-2-80	Jury Demand filed (illegible)
MAY 16 1980	... 7-29-80
[illegible]	
	@ 9:30 a.m.

RELEASE INFORMATION

BAIL 50.00
BOND
RECOG
O.W.
PAGE 20-285
DATE 3/31/80
ID #
PLATE NO. 11476



V140183

RICHARD N. McCARTY 123915

DATE-JUDGE	PROCEEDINGS
JUL 29 1980	Plea of Not Guilty entered
Gelbke	Jury Waived - R/A
	P.C. 9/4 9:00 AM.
July 29, 1980	Motion to suppress statements filed
August 18, 1980	Motion to suppress specifically overruled upon authority of
Gelbke	State v. Cyle 17 OS 2d 64 (1969)
8-11-80	R/A Comm 9/4 9 AM Rem to 9/15 10 02 AM Rem to
SEP 15 1980	EFFECT OF PLEAS, RIGHT TO APPEAL/LEAVE ENTRY, COUNSEL FOR CASE, R. 44 EXPLAINED TO DEFENDANT BY COURT. (ATTORNEY) (COURT APPOINTED) WAIVED. PLEA OF GUILTY (NO) ENT.
Gelbke	Finding of Guilty
	See next Page for
	Sentence

V140183

Richard N. McCarty

529 Lexington Ave

Columbus, Ohio

DOB 3-6-53 4285

DATE-JUDGE	PROCEEDINGS
SEP 15 1980	Sentence:
Golden	90 days CJ.
	$300 + Costs
	ds - 6 months
	Suspend 90 days last CJ
	Sentence (Apply 6 serve
	4 days in AID Progr.)
	+ Def to serve 6 days
	in CJ.
	Suspend $100. of the
	fine
	Able to pay.
	9/26 fine by 3 days CJ.
	10/3 fine by 3 days CJ.
	10/31 fine by 4 days
	4 days ($200.00) + Costs.
9-16-80 NOTICE OF APPEAL FILED	
STIPULATION FILED WITH ATTACHED JOINT	
EXHIBIT- ENTRY STAYING EXECUTION OF	
SENTENCE PENDING OUTCOME OF APPEAL,	
GOLDEN - 10-24-80 FOR ALL PAPERS TO	
COURT OF APPEALS	

APPENDIX D

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 80AP-680

State of Ohio,
Plaintiff-Appellee,
v.
Richard N. McCarty,
Defendant-Appellant.

DECISION

Rendered March 10, 1981

MR. GREGORY S. LASHUTKA, City Attorney,
MR. RONALD J. O'BRIEN, City Prosecutor,
MR. DAVID E. TINGLEY, Assistant,
375 South High Street,
Columbus, Ohio 43215
For Plaintiff-Appellee.

MR. R. WILLIAM MEEKS,
503 South High Street,
Columbus, Ohio 43215,
For Defendant-Appellant.

REILLY, J.

This is an appeal from a judgment of the Franklin County Municipal Court.

Appellant has perfected this appeal, including one assignment of error:

"The Trial Court erred by overruling Appellant's Motion to Suppress Statements following his arrest for driving a motor vehicle under the influence of drugs where such statements were taken in violation of the Appellant's right against self-incrimination

and right to counsel, thereby violating the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution."

The record shows that Appellant was charged with violating R.C. 4511.19, a first degree misdemeanor, when the arresting officer determined that he was operating a motor vehicle under the influence of drugs "marijuana".

Appellant moved to suppress evidence of certain statements he made to the officer. The court overruled the motion. Appellant pled no contest and was found guilty as charged.

Counsel entered the following stipulation, which was signed by the trial judge:

"Had there been an evidentiary hearing, the defense would have called as witness Trooper C.J. Williams of the Ohio State Highway Patrol. His stipulated testimony is as follows: On March 31, 1980, Trooper Williams, while on his regularly assigned duty, observed the Defendant's vehicle traveling south on Interstate 270 at milepost 30. Trooper Williams observed the Defendant's vehicle weaving in and out of its expected lane of travel. Trooper Williams followed the Defendant's vehicle for approximately two miles, at which time it was stopped and the Defendant was asked to exit the car. Trooper Williams observed that the Defendant needed support to keep himself from falling as he got out of his vehicle.

"At this time Trooper Williams concluded that the Defendant would be charged with a traffic offense and, therefore, his freedom to leave the scene was terminated. The Defendant was then asked to perform the field sobriety test, designated as the 'balance

test,' and according to Trooper Williams, he was 'falling.' While still at the scene of the arrest, Trooper Williams questioned the Defendant concerning his use of intoxicants and the Defendant replied that he had consumed two beers and had also smoked several joints of marijuana a short time before. While questioning Defendant, Trooper Williams noticed that the Defendant's speech was very slurred and mush-mouthed and it was hard to understand him. The Defendant was then formally placed under arrest for operating a motor vehicle while under the influence of alcohol and taken to the Franklin County Jail for an intoxilyzer test to determine the percentage of alcohol present in the Defendant's system. The result of the test was .000.

"While at the Franklin County Jail, Trooper Williams continued to question the Defendant in order to fill out the information sought by the State Highway Patrol Alcohol Influence Report. (A copy of the completed Alcohol Influence Report is admitted as a joint exhibit and is formally made a part of the stipulation herein.) While questioning the Defendant concerning information contemplated by the Alcohol Influence Report, Trooper Williams asked the Defendant if he had been drinking, to which the Defendant responded in the affirmative. Trooper Williams asked the Defendant if he were under the influence of alcohol, to which the Defendant responded 'I guess, barely.' Trooper Williams asked the Defendant if the marijuana he admitted smoking had been treated with another chemical and requested the Defendant to write out his response. As indicated on the Alcohol Influence Report form under

the section designated 'Remarks,' the Defendant responded in writing 'no angle [sic] dust or PCP in the pot. Richard McCarty.'

"It is further stipulated between the parties that Trooper Williams did not advise the Defendant of his constitutionally protected rights, announced in *Miranda v. Arizona*, prior to questioning the Defendant either at the scene of the arrest or later in custody at the Franklin County Jail."

The crux of this case is whether the *Miranda* rights concerning the custodial interrogation of an accused, extends to misdemeanor cases. The Supreme Court held in *State v. Pyle*, (1969), 19 Ohio St. 2d 64, in paragraph one and two of the syllabus:

"1. In Ohio, a misdemeanor or a minor offense is a crime for which a person may not be imprisoned in the penitentiary, and may not be imprisoned for more than one year. (Section 1.05 and 1.06, Revised Code, construed and applied.)

"2. The holding of *Miranda v. Arizona*, 384 U.S. 436, is not applicable to misdemeanors, as presently defined in Ohio."

Further, this Court wrote in the unreported decision *State v. Winkfield*, No. 72AP-346, Franklin County Court of Appeals, rendered on July 24, 1973 (1973 Decisons, page 2150 at 2154-2155) as follows:

"The Ohio Supreme Court has held in *State v. Pyle*, (1969), 19 Ohio St. 2d 64, syllabus paragraph 2, that *Miranda v. Arizona*, (1965) 384 U.S. 436, is not applicable to misdemeanors. The court amplified the syllabus at page 67 of the decision as follows:

" 'It is a fact so well known that judicial notice can be taken that the investigative procedures ordinarily

followed with respect to misdemeanors by law enforcement officers differ markedly from the investigative procedures ordinarily followed with respect to felonies. No law enforcement agency possesses the physical facilities, or the manpower, to investigate and interrogate each person suspected of a misdemeanor to the degree and extent accorded each person suspected of a felony. Nor is there usually any necessity for concentrated investigation or interrogation. In the great majority of misdemeanor cases (traffic offenses). the offense has taken place in the presence of the arresting officer. Nearly all interrogation occurs, as in the instant case, at or near the scene of the infraction, not in any coercive atmosphere created by the law enforcement authorities.'

"Hence, *Argersinger, supra*, by extending the right of counsel at trial, does not extend to misdemeanor in-custodial interrogations within the Sixth Amendment right of counsel. * * *"

Whereupon, for the foregoing reasons, appellant's assignment of error is not well taken and is overruled. Accordingly, the judgment of the Franklin County Municipal Court is affirmed.

Judgment affirmed.

WHITESIDE and NORRIS, J.J. concur.

APPENDIX E

IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

No. 80AP-680
March 13, 1983

State of Ohio,
Plaintiff-Appellee,
v.
Richard N. McCarty,
Defendant-Appellant.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on March 10, 1981, the assignment of error is overruled, and it is the judgment and order of this Court that the judgment of the Franklin County Municipal Court is affirmed.

WHITESIDE, REILLY & NORRIS, JJ.

By /s/ Archer E. Reilly
Judge Archer E. Reilly

cc: David E. Tingley
R. William Meeks

APPENDIX F

JUL 2 198

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

State of Ohio,
Appellee,
vs.
Richard N. McCarty,
Appellant.

19 81 TERM
To wit: July 1, 1981

No. 81-710

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS

for FRANKLIN County

TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $30.00, paid by R. William Meeks

I, Thomas L. Startsman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19.....

..... Clerk

..... Deputy

JUL 2 1981

BC-18A 75-3-1500 Baker Business, Publishers, Systems, Ohio

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 81 *TERM*

To wit: July 1, 1981

State of Ohio,
Appellee,
vs.
Richard N. McCarty,
Appellant.

No. 81-710

APPEAL FROM THE COURT OF APPEALS

for FRANKLIN *County*

This cause, here on appeal as of right from the Court of Appeals for FRANKLIN *County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

FOR YOUR INFORMATION
NOT PUBLIC

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for FRANKLIN *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ____ day of ____ 19____

Clerk

Deputy

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION
December 11, 1981

RICHARD N. McCARTY
Petitioner

vs. Civil Action C-2-81-1118

CAPTAIN HERDMAN
Respondent

OPINION AND ORDER

Petitioner brings this action for a writ of habeas corpus under 28 U.S.C. § 2254. This matter is before the Court on the petition, return of writ, and the briefs and exhibits of the parties.

At trial, he pleaded no contest on a stipulated record and on September 15, 1980 petitioner was convicted of operating a motor vehicle while under the influence of drugs in violation of § 4511.19, Ohio Revised Code. The trial judge sentenced him to ninety (90) days incarceration in the Franklin County Jail which was suspended.

Petitioner appealed his conviction to the Court of Appeals for Franklin County which affirmed the trial court judgment. Thereafeter, he attempted an appeal from the Court of Appeals to the Supreme Court of Ohio, and that court overruled his motion for leave to appeal.

Petitioner alleges that he is deprived of liberty in violation of the Constitution of the United States in that:

(1) His conviction was obtained in violation of his constitutional rights to counsel and against self-incrimination because the police obtained

> incriminating admissions from him during custodial questioning without first providing his *Miranda* warnings.

He contends that law enforcement officers must give the *Miranda* [*Miranda v. Arizona*, 384 U.S. 436 (1966)] warnings to an arrestee prior to a custodial interrogation following an arrest for a misdemeanor traffic offense. The parties have stipulated that petitioner was not informed of his *Miranda* rights prior to in custody questioning by Trooper Williams, the arresting officer.

The United States Supreme Court has not considered whether *Miranda v. Arizona*, *supra*, applies in cases involving traffic offenses or other misdemeanors. *Lewis v. New Jersey*, 414 U.S. 905 (1979) (White J., dissenting). The Supreme Court of Ohio has held that *Miranda* does not apply to misdemeanor cases, *State v. Pyle*, 19 Ohio St. 2d 64, 249 N.E. 2d 826 (1969) *cert. denied*, 396 U.S. 1007, and the prevailing view is that *Miranda* does not apply to traffic offenses. *Clay v. Riddle*, 541 F. 2d 456 (4th Cir. 1976); *State v. Neal*, 476 S.W. 2d 547 (Mo. 1972); *State v. Bliss*, 238 A. 2d 848 (Del. 1968); *Copler v. Greenville*, 207 So. 2d 339 (Miss. 1969) *cert. denied*, 392 U.S. 941; *State v. Macuk*, 268 A. 2d 1 (N.J. 1970). *See also*, *State v. Gabrielson*, 192 N.W. 2d 792 (Iowa 1969). *But see*, *State v. Lawson*, 204 S.E. 2d 843 (N.D. 1974); *State v. Darnell*, 508 P. 2d 613 (Wash. 1973), *cert. denied*, 414 U.S. 1112; *Campbell v. Superior Court*, 479 P. 2d 685 (Ariz. 1971). *Contra*, *State v. Fields*, 294 N.W. 2d 404 (N. D. S. Ct. 1980); *State v. Lawson*, 204 S.E. 2d 843 (N.C. S. Ct. 1974).

In *Clay v. Riddle*, 541 F. 2d at 457, the United States Court of Appeals for the Fourth Circuit stated:

> . . . [I]t is noteworthy that the unlawful incident was a commonplace event—a traffic offense— a

> breach of the law to which we believe the Supreme Court's decision does not extend. This circumstance alone—not that the misconduct was a misdemeanor as to which *Miranda* has been said to be inopposite—is the basis of our present holding that *Miranda* warnings were not required. . .

The Court finds the reasoning of the Court of Appeals to be persuasive; and accordingly, the Court HOLDS that *Miranda* warnings do not have to be given prior to in custody interrogation of a suspect arrested for a traffic offense.

WHEREUPON, the Court FURTHER HOLDS that the petition is without merit; and, therefore, it is DENIED.

This action is hereby DISMISSED. The Clerk of Court shall enter JUDGMENT for respondent.

/s/ Joseph P. Kinneary
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
FOR
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Richard N. McCarty

v Case No. C-281-1118

Captain Herdman

JUDGMENT

This action came on for consideration before the Court, The Honorable Joseph P. Kinneary, United States District Judge, presiding. The issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED THAT: the petition is without merit and is denied. Action is dismissed. Judgment is for the respondent.

Dated at Columbus, Ohio this 11th day of December, 1981.

JOHN D. LYTER, CLERK

By:/s/
Deputy Clerk

APPENDIX I

No. 82-3216

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RICHARD McCARTY,
Petitioner-Appellant,

v.

CAPTAIN HERDMAN,
Respondent-Appellee.

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed September 6, 1983.

Before: KENNEDY, MARTIN, and WELLFORD, Circuit Judges.

MARTIN, Circuit Judge, delivered the opinion of the Court, in which KENNEDY, Circuit Judge, joined. WELLFORD, Circuit Judge, (pp.7-8) delivered a separate, dissenting opinion.

BOYCE F. MARTIN, Jr., Circuit Judge. This appeal presents the sole issue of whether law enforcement officers must give "*Miranda* warnings" to individuals in custody for misdemeanor traffic offenses. *See Miranda v. Arizona*, 384 U.S. 436 (1966).

Richard McCarty appeals the denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petitioner was convicted of operating a motor vehicle while under the influence of alcohol and/or drugs in violation of Ohio Revised Code § 4511.19, a first degree

misdemeanor. Evidence supporting his conviction included incriminating statements which he tried unsuccessfully to suppress. He was sentenced to ninety days in jail, eighty of which were suspended. The Miami County Court of Appeals reversed but the Ohio Supreme Court reinstated the conviction. The district court below denied habeas relief because in its judgment, one arrested for a misdemeanor traffic offense is not constitutionally entitled to *Miranda* warnings. *See, e.g., Clay v. Riddle*, 542 F. 2d 456 (4th Cir. 1976); and *Ohio v. Pyle*, 19 Ohio St. 2d 64 (1969). McCarty appeals from that decision.

The state trooper's arrest report and the parties' stipulation comprised all the facts before the trial judge. Ohio State Trooper Williams observed McCarty's car weaving in and out of its lane while traveling south on Interstate 270 on the evening of March 31, 1980. Trooper Williams stopped the car and asked McCarty to get out. He noticed that McCarty needed support to keep from falling as he exited the vehicle. "At this time Trooper Williams concluded that the defendant would be charged with a traffic offense and, therefore, his freedom to leave the scene was terminated."[1] (Joint stipulation.)

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[1] While the parties so stipulate, we do feel bound by the subjective standards implied in the stipulation. *See* United States v. Harris, 611 F. 2d 170,172 (6th Cir. 1979). In Lowe v. United States, 407 F. 2d 1391 (9th Cir. 1969), the court stated:

> It follows that *the time when* the officer's intent to arrest is formed has no bearing on the question of whether or not there exists "in custody" questioning. whether a person is in custody should not be determined by what the officer or the person being questioned thinks; there should be an objective standard. Although the officer may have an intent to make

McCarty had difficulty performing the field sobriety balancing test. While still at the scene of the arrest, he told Trooper Williams that he had recently consumed two beers and several joints of marijuana. McCarty's speech was very slurred and Trooper Williams had difficulty understanding him.

Trooper Williams placed McCarty under formal arrest and took him to the county jail for an intoxilyzer test. The test showed no alcohol in McCarty's system. At the jail, McCarty answered Trooper Williams' questions for the State Highway Patrol Alcohol Influence Report. McCarty responded that he was "barely" under the influence of alcohol. At Trooper Williams' request, McCarty wrote on the report that the marijuana he had smoked had not been treated with "PCP"or "angel dust." At no time, either before or after McCarty was taken into custody, did Trooper Williams advise him of his constitutional rights.

Before the trial judge, McCarty moved to exclude his statements to Trooper Williams. His motion was denied. He pleaded *nolo contendere* and was found guilty of driving while intoxicated.

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an arrest, either formed prior to, or during the questioning, this is not a factor in determining whether there is present "in-custody" questioning. It is the officer's statements and acts, the surrounding circumstances, gauged by a "reasonable man" test, which are determinative.

Id. at 1397; *accord*, United States 1. Booth, 669 F. 2d 1231, 1235 (9th Cir. 1981). *See also* Oregon v. Mathiason, 429 U.S. 492, 495 (1977).

[3] Habeas relief after a guilty plea is permissible. *See* Lefkowitz v. Newsome, 420 U.S. 283 (1975) (Justices White, Powell, Burger, and Rehnquist dissenting.)

McCarty argued consistently, at both state and federal levels [2] that *Miranda v. Arizona* required law enforcement officers to advise all persons taken into custody of their constitutional rights to counsel and to remain silent. Because he was not so advised when arrested for drunken driving, he maintains that the statements he made while in police custody cannot support his conviction. We agree.

In *Miranda*, the Supreme Court held that an individual in police custody may not be interrogated until and unless he is first advised that he has the right to remain silent; that anything he says may be used against him; that he had the right to an attorney; and that an attorney will be appointed for him if he cannot retain one. These warnings are an "absolute prerequisite to interrogation," said the court, 384 U.S. at 467, and without the warnings, the fruits of a custodial interrogation are inadmissible at trial.

> To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege. . . . But unless and until such warnings are demonstrated . . . , no evidence obtained as a result of interrogation can be used against him.

384 U.S. at 478-479 (footnote omitted).

Miranda, then, creates procedural safeguards to secure the fifth amendment privilege against self-incrimination. Although felony offenses were specifically in issue in *Miranda* and its companion cases, the language of the opinion does not limit the safeguards to individuals suspected of felonies. Similarly, yet more importantly, the language of the fifth amendment does not limit the privilege

against self-incrimination to those charged with felonies. It has never been suggested that a defendant charged with a misdemeanor could be compelled to testify against himself. To so argue would be both illogical and inconsistent. "[T]here can be no doubt that the Fifth Amendment privilege . . . serves to protect persons *in all settings* in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." 384 U.S. at 467 (emphasis added). We hold that *Miranda* warnings must be given to *all* individuals prior to custodial interrogation, whether the offense investigated be a felony or a misdemeanor traffic offense.

Our reasoning here follows *Argersinger v. Hamlin*, 407 U.S. 25 (1972), which concerned the scope of the sixth amendment right to counsel. There the defendant faced potential incarceration for committing a misdemeanor. The Court held, "[a]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *Id.* at 37. The Court relied heavily on *Gideon v. Wainwright*, 372 U.S. 335 (1964), for the proposition that all defendants, including the indigent, are entitled to counsel. Although *Gideon* nor the sixth amendment right to counsel was limited to "serious" offenses. 407 U.S. at 30. We follow this same reasoning to extend the right to counsel to individuals charged with misdemeanors.

We recognize that the Fourth Circuit in *Clay v. Riddle*, 541 F. 2d 456 (4th Cir. 1976), declined to require *Miranda* warnings for misdemeanor traffic offenses. That court's decision seemed to turn on two factors. First, the court noted its awareness of language in *Miranda* that the *Miranda* decision was "not intended to hamper" the traditional investigative functions of the police. *Miranda*, 384

U.S. at 477, *quoted in Clay*, 541 F. 2d at 457. Second, the court emphasized that "the unlawful incident [in *Clay*] was a commonplace event — a traffic offense . . . ." *Id.* Neither of these factors convinces us that *Miranda* does not apply to traffic misdemeanors.

First, the traditional investigative police functions will not be hampered by requiring *Miranda* warnings prior to custodial interrogations in misdemeanor traffice offenses. "On-the-scene questioning," preserved by the *Miranda* Court, is likewise preserved today. To the extent that *Miranda* and its progeny permit non-custodial interrogations when a felony is investigated, our decision permits the same when a misdemeanor traffice offense is investigated. It is only when an individual "has been taken into custody or otherwise deprived of his freedom of action in any significant way," *Miranda*, 384 U.S. at 444, that warnings must be given before questioning begins. We do not hold that the mere stopping of a motor vehicle triggers *Miranda*. Because the police gather information in misdemeanor traffic offenses primarily through on-the-scene questioning, their freedom to investigate remains essentially unhampered.

Second, we attach no significance to the fact that traffic offenses are "commonplace" events. The privilege against self-incrimination is an enduring right, undiminished by the number of people who enjoy it or the frequency of its exercise. The mere fact that police officers may frequently have to advise individuals of their constitutional rights does not justify limiting these important procedural safeguards to felony cases. Furthermore, although traffic offenses may be commonplace, *custodial interrogations* stemming from misdemeanor traffic offenses are *rare*. For these reasons, we decline to adopt the Fourth Circuit's reasoning in *Clay* that *Miranda* warnings do not

apply to the present situtation because the offense is commonplace.

We believe that the facts of the present case require that Trooper Williams should have advised McCarty of his constitutional rights. At the point that Trooper Williams took McCarty to the police station, his "freedom of action [was] curtailed in [a] significant way." The failure to advise McCarty of his constitutional rights rendered at least some of his statements inadmissable. *Miranda.*

Because the petitioner was convicted on inadmissible evidence, we vacate his conviction. Accordingly, we remand the case to the district court for the issuance of a writ of habeas corpus, giving the State of Ohio ninety days in which to retry McCarty.

WELLFORD, Circuit Judge, dissenting. I agree with much of the majority opinion in this case. As I read the opinion, the majority finds that McCarty was not in custody until he was formally placed under arrest. During the original confrontation and investigation at the scene, McCarty was not significantly deprived of freedom of action, despite the stipulation that the officer knew that McCarty would be arrested as soon as he got out of his automobile. This comports with the language in *Miranda v. Arizona*, 384 U.S. 436, 477-78 (1966) stating:

> Our decision is not intended to hamper the traditional function of police officers in investigating crime. . . . General on-the-scene questioning as to facts surrounding a crime. . . is not affected by our holding. . . . In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.

Consequently, I agree that McCarty's statements made prior to formal arrest were made in a noncustodial situation and were therefore admissable. *See, U.S. v. LeQuire*, 424 F. 2d 341, 434-344 (5th Cir. 1970).

Even if a suspected traffic offender were deemed to be "in custody" or significantly "deprived of his freedom" by the investigating officer *at the scene* of an investigation for a misdemeanor offense, (and McCarty was here charged with a first degree misdemeanor under Ohio law), I would hold that any admission or confession made under such circumstances to be admissable without a *Miranda* warning. *See, Clay v. Riddle*, 541 F. 2d 456 (4th Cir. 1976).

I agree with the majority, however, that the later questioning after formal arrest at the police station was subject to *Miranda, supra*, since this was clearly a custodial situation. *Argersinger v. Hamlin*, 407 U.S. 25 (1972), holds that a defendant charged with a misdemeanor, even a traffic offense, must have counsel if he is to be sentenced to jail, but the right to counsel would not apply as a constitutional requirement if an offender were deprived of his automobile license or fined in a misdemeanor proceeding. Application of this rationale to admission of evidence without a *Miranda* warning in this "first degree misdemeanor" situation compels the conclusion that *Miranda* warnings are only required in a *clearly* custodial situation, as where a formal arrest is made. McCarty's confessions at the police station, therefore, if material, since they came after arrest and formal charges, would be inadmissible.

The later confessions, however, merely reiterate what McCarty had already admitted at the scene to the investigating officer. Failure to suppress what was essentially repetitious confession evidence, which should not have been admitted on the basis of failure to give *Miranda* warnings at the jail, was harmless error under the circumstances.

Chapman v. California, 386 U.S. 18 (1967). I would therefore affirm the district court's denial of habeas corpus relief.